



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831

July 24, 2017

Re: JIC Advisory Opinion 2017-17

Dear

Your request for an advisory opinion was recently reviewed by the Judicial Investigation Commission. The facts giving rise to your question are as follows: A long-time assistant prosecutor in \_\_\_\_\_ County has recently become the new Public Defender in that county. At one time, she served as the Chief Assistant Prosecutor and was also the acting prosecutor two or three years ago. One of her duties as an assistant prosecutor was to review indictments. She was also going to prosecute about 25 of the 71 indictments that were returned in the May 2017 term before she became the Public Defender.

Knowing that the new public defender would be conflicted off all of those cases in which she had a prior personal and substantial involvement as an assistant prosecutor, you question whether the assistant public defenders in her office would also be disqualified from those same cases even if the public defender was screened from such cases.

You asked the Office of Lawyer Disciplinary Counsel for advice and they believe the assistant public defenders would also be conflicted off those cases where the public defender had personal and substantial involvement as an assistant prosecutor pursuant to Rule 1.11(a) and (b) of the Rules of Professional Conduct. However you question whether the Office of Lawyer Disciplinary Counsel's decision is correct and you have provided great detail for your position, which you base on the statutory language governing the Public Defender, Assistant Public Defenders, and the Public Defender Corporations, and Rule 1.11 of the Rules of Professional Conduct. You believe that this issue has placed you in an ethical quandary of whether to disqualify the assistant public defenders from such cases.

A majority of the commissioners question whether they should issue an advisory opinion on the question you have asked because they are of the opinion that this issue is not

governed by general ethical standards or the Code of Judicial Conduct. However, because the Code is intended to provide guidance to assist judges in maintaining the highest standards of judicial and personal conduct and to provide a basis for regulating their conduct, the Commission has decided to give you its opinion on the issue.

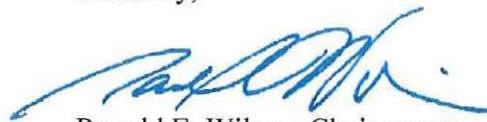
The Commission has reviewed Rule 1.1 of the Code of Judicial Conduct which states that "a judge shall comply with the law, including the West Virginia Code of Judicial Conduct." Rule 2.15 (D) of the code of judicial conduct requires a judge to take appropriate action if the judge has knowledge indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct. But Comment [2] of the Rule clarifies the meaning of the Rule by requiring that the judge have "knowledge indicating a substantial likelihood of misconduct" by the lawyer. Obviously if the law is not settled-and the disqualification issue before you falls in the category- you must follow the interpretation that you believe is the correct and proper principle. When a judge follows that method, he or she does not violate the Code of Judicial Conduct even if the decision is later reversed on appeal.

It is also well established, through the opinions of the Supreme Court of Appeals of West Virginia, that when a judge, with no intent to prejudice the rights of a party, makes a legal error his or her acts do not constitute a violation of the Code of Judicial Conduct.

It is the opinion of the commission that if you believe your interpretation of the law is correct then that is the one you should apply when you decide under what conditions the assistant public defenders would or would not be disqualified from those cases in which the new public defender is disqualified. Therefore, you cannot violate the Code of Judicial Conduct by coming to a conclusion different from the informal opinion of the Office of Lawyer Disciplinary Counsel.

We hope this opinion fully addresses the issue which you raised. If there is any further question regarding this matter do not hesitate to contact the Commission.

Sincerely,



Ronald E. Wilson, Chairperson  
Judicial Investigation Commission